United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1023

To be argued by
PETER M. J. REILLY, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

ERNESTO LOPEZ,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

PETER M. J. REILLY, JR.
Attorney for Defendant-Appellant
444 Main Street
Islip, New York 11751
(516) 581-8687

TABLE OF CONTENTS

MISCELLANEOUS

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

ERNESTO LOPEZ,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Statement of Facts

On or about August 21, 1975, the defendant, Ernesto Lopez, was charged in indictment 74 CR 527 with 20 counts of harboring aliens in violation of Title 8, United States Code, Section 1324 (a)(3), and three counts of making false, fictitious statements to a government agency in violation of Title 18, United States Code, Sections 1001 and 1546, and sometime subsequent thereto, with one count of obstructing justice.

The substance of each of the first 20 counts of these indictments was that the defendant harbored 20 different individuals in houses he owned in Levittown, New York, or in areas in proximity to Levittown, knowing that these individuals were aliens not duly admitted into the United States by an immigration officer, nor lawfully entitled to reside within the United States.

Subsequent thereto, a trial was commenced in the Eastern District Court before the Honorable Thomas Platt. The

trial ended on October 23, 1974, after the defendant, by his attorney, moved for the dismissal of the indictment after both the People's *prima facie* case and after the defendant had rested his case. Each and every motion was denied with respect to the dismissal of the indictment.

During the recess and prior to summations, negotiations were entered into by the defendant by his attorney and the United States Attorney's office and the following disposition of the case was agreed to by both parties.

The defendant, Ernesto Lopez, would plead guilty to a one count information charging him with conspiracy to harbor aliens in violation of Title 8, United States Code, Section 1324 (a)(3), and a second count related to the last three counts of the indictment. With respect to the first count of the information, it was agreed by the parties that all rights would be preserved to appeal all questions of construction of the statute and the definition of its terms and any constitutional questions that may have arisen in the interpretation applied by the trial court to the statute. The defendant plead guilty pursuant to this stipulation and this appeal is taken pursuant to that stipulation.

The facts of the case, in summary, show that the defendant, Ernesto Lopez, did, in fact, give housing and shelter to a certain number of illegal aliens, but that he did so openly and there is no evidence in the case to indicate that there was anything of a secretive nature done by the defendant in giving such shelter, nor will the record indicate that the defendant, in any way, participated in any aspect of a smuggling operation and that each and every one of the individuals had been in the country for some period of time prior to meeting Mr. Lopez and that when they met him, they had completed their journey to a desired location.

The record will further indicate that each of these aliens came here for the specific purpose of obtaining employment and that during the time they resided in Mr. Lopez's homes,

they lived normal lives and Mr. Lopez, in no way, committed any act which would prevent the authorities from apprehending any of these aliens. The record will further indicate that to the knowledge of any of the witnesses who testified in this case, no one has ever been arrested for merely supplying a place to live to an illegal alien, nor did this writer or the United States Attorney's office find any case where an individual was prosecuted for merely giving housing to illegal aliens. Therefore, this case is one of first impression with regard to the application of Section 1324 to a landlord for merely giving housing to illegal aliens.

Subsequent thereto, on January 10, 1975, the defendant was sentenced to four years in prison and a $10,000.00 fine for the violation which is herein appealed and two years and a $5,000.00 fine for the second count of the indictment.

Statement of Issues

1. Did the trial court err in not dismissing the indictment for failure to prove a *prima facie* case and a case beyond a reasonable doubt that the conduct of the defendant was within the scope of the statute, which statute concerns itself solely with smuggling and conduct incidental thereto?

2. Did the trial court err in denying the defendant's motion to dismiss the indictment due to the failure of the government to prove that the defendant had harbored any aliens within the proper definition of that term and did the court err in its definition of the term harboring?

3. Did the trial court err in not dismissing the indictment as being unconstitutionally vague per se and as applied to the facts of this case and did it also err in that the statute failed to give the defendant adequate notice that his actions were in violation of law?

4. Was the trial court in error in not declaring that the statute as applied to the appellant violated his constitutional rights with respect to equal protection of law and due process of law?

POINT I

The trial court erred in not dismissing the indictment for failure to prove a *prima facie* case in that the conduct of the defendant was not within the scope of the statute, which statute concerns itself solely with smuggling and the conduct incidental to smuggling.

It is the appellant's contention that the conduct prohibited by Title 8, United States Code, Section 1324 (a)(3) must be read in the context of that whole statute and must be considered in light of its legislative and judicial history. For that reason, a recitation of that history is set forth herein. Before beginning that recitation, however, it should be noted that the trial record, especially as it pertains to the first count of the information which this individual plead guilty pursuant to the agreement that the right to appeal those questions of law would be preserved, in no way indicates that the defendant had any connection with the smuggling or bringing these individuals into the country or transporting them or in any way hiding or secreting any of them. That record further indicates that they lived normal lives while residing in the premises which he owned and he acted merely as a landlord for them.

For all practical purposes, the original version of Title 8, United States Code, Section 1324 was enacted in 1907, 34 Stat. 898,900. That piece of legislaation prohibited the bringing in or landing or attempting to bring in or land aliens illegally in this country. Thereafter, in 1917, an amendment to that bill was added prohibiting the concealment or harboring of illegal aliens. The Senate Report accompanying the 1917 amendment stated that,

". . . such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States and related offenses . . .", *Senate Report 352, 64th Congress, 1st Session 9.* Prior to the addition of the harboring section, the judicial constructions of this word as applied to criminal or quasi-criminal cases seems to be applied, mainly, in the area of slave cases and the underground railroad. *Jones* v. *Van Zandt,* 5 How. 215, 227, 12 *Lawyers Edition 122.* In these old cases, the court described the word harbor as to receive clandestinely and without lawful authority the person for the purpose of so concealing him that another person having a right to the lawful custody of said person, shall be deprived of same. This court is requested to be particularly cognizant of the words "clandestinely" and "concealing" in the definition of the term.

Subsequent to the 1917 enactment, which was in substance the same as the present law with respect to harboring:

The first major decision on the question of the definition of the term harboring was rendered in the case of *Susjnar* v. *U.S.,* C.C.A. Ohio, 27 F.2d 223, 224, in construing the 1917 act, and the predecessor to the present 1324 statute, the court stated, ". . . When taken in connection with the purposes of the act, we conceive the natural meaning of the word 'harbor' to be clandestinely shelter, succor and protect improperly admitted aliens and that the word 'conceal' should be taken in the simple sense of shielding from observation and preventing discovery of such aliens persons . . ." The facts of the case were, briefly, that the defendants smuggled in aliens from Canada and put them up in the dead of night in the defendant's house and was later to transport them to another area in the United States. Based on these facts which fit within the definition of harboring, the court sustained that conviction. It should be clearly noted that the harboring in the *Susjnar*

case was proximately connected with the process of smuggling and an integral part of the process.

Thereafter, in 1940, the next significant case in the field arose where a court again had an oppportunity to define the meaning of the term harboring under the 1917 statute. In *U.S.* v. *Mack,* 112 F.2d 290, the court stated, ". . . Indeed, the word 'harbor' alone often connotes surreptitious concealment . . ."

Thereafter, the next case of any significance of construing this statute was the case of *U.S.* v. *Evans,* 333 U.S. 483-495. This was a 1948 decision by the United States Supreme Court delivered by Mr. Justice RUTLEDGE. In construing the 1917 statute, which read in the applicable sections almost exactly as the present statute, 1324, does, the court was called upon to consider the failure of Congress to put in any penalty provision for concealing or harboring. In this case, the government took the position that harboring and concealing were a part of the smuggling process and, therefore, the same penalty provisions were intended for the harboring section as well as for the smuggling sections. The court, in its decision, ultimately decided that a penalty provision had not been properly provided. However, the court, in its opinion, stated the following:

> ". . . In the first place, the section as originally enacted was limited to the acts of smuggling. And there is some evidence in the legislative history that the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process[5] . . ." In footnote 5 of the decision in *Evans,* the footnote states that the Senate Report accompanying the 1917 amendment stated that, "such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States . . .", *Senate Report 352, 64th Congress, 1st Session 9.*

The court went on to say:

> ". . . The very real doubt and ambiguity concerning the scope of the acts forbidden, if any, beyond those clearly and proximately connected with smuggling raise equal or greater doubt that Congress meant to encompass all those acts within the penal provisions for smuggling. If acts disconnected from that process are forbidden, the separate offenses of concealing and more particularly of harboring, if the two are distinct, might require, in any sound legislative judgment, very different penalties from those designed to prevent or discourage smuggling in its various phases. That is essentially the sort of judgment legislators rather than courts should make . . ."

In response to the *Evans* case, the Congress supplied the penalty provisions as to concealing and harboring, but in no way did it change or amplify or further define the term harboring and concealing. It, therefore, seems apparent that there was no legislative intent to change the meaning of the term harboring from the judicial interpretations of the word that had previously been applied, to wit: *U.S.* v. *Mack,* (*supra*) and *U.S.* v. *Susjnar* (*supra*), despite the suggestion by the *Evans* court that it further define the meaning of harboring, especially with reference to any act outside the scope of smuggling. There is nothing to indicate that the Congress did this, nor does the phrasing of the statute in this area indicate any change in the prior legislative or judicial interpretations of the word harboring. The only thing the committee did was to exempt employers from liability as to harboring. That exemption included the usual and normal practices incidental to employment.

This exemption must be taken in the context of the ongoing hearings which ultimately resulted in the present McCarrin-Walters Act. The Congressional debate which

is quoted in part herein concerned itself, in the main, with the existent illegal alien problem of the early 1950's, to wit: migrant labor in the southwest which was referred to i nthe debates as the "wetback problem". The concern with the wetback problem is evidenced in the Congressional hearing on what is presently Section 1324, as follows:

Mr. HUMPHREY:

"Senators are aware of my own deep interest in the wetback provisions of our immigration laws. We debated the wetback problem day in and day out earlier in the session." P. 5319

Mr. HUMPHREY:

"We passed a bill on the subject in the Senate this years . . . In other words, in view of the wetback problem, . . ." P. 5320

Mr. MORSE:

"Let me ask a question about section 274. As I read the section, it is aimed at persons who seek to smuggle aliens into the United States illegally." P. 5320

Mr. MORSE:

"I assume that the objective is to apply the section to any person in the field or activity of transportation who smuggles aliens into this country. The Senator has referred to such aliens as a type of wetback. This section provides that anyone who brings such aliens into the country shall be guilty under this provision. Apparently that is what the committee is aiming at. He shall be guilty if he conceals or harbors, or attempts to conceal or harbor or assists or abets another to conceal or harbor, in any place including any building or means of transportation. Up to that point in this section, the bill is aimed at punishing the transporter." P. 5320

Mr. HUMPHREY:

"That is correct." P. 5320

Mr. MORSE:

"Or the person who is party to the transaction." P. 5320

Mr. MORSE:

"I assume that in the first instance, in this section; they are not seeking to go after the hotel owner or the private citizen who, as the Senator has pointed out, in keeping with Christian principles may take a refugee or alien into his home, not knowing that he is an alien or a refugee. The committee is seeking to put its finger on one of the great sources of illegal entry, which all through the history of American immigration problems, has proved to be transporters or smugglers of human beings." P. 5320.

Mr. MORSE:

"I think it is quite proper for the committee to go after the individuals who are engaged in this traffic in human beings." P. 5320

Mr. HUMPHREY:

"I am sure that this purpose is honorable and right." P. 5320

Mr. MORSE:

"I think its intent is to get the source of smuggling human beings into the United States and to make such acts a crime. I am in complete agreement with that viewpoint." P. 5320.

It is obvious from this debate and from the sociology of the problem that the enactment of the various provisions in the bill and particularly the exemption of employers

concerned itself with the exempting the farmer who hired migrant alien help and the Congress did not wish him to be liable under the statute.

Since the enactment of this bill, which is unchanged as of this date, the sociology of this problem has significantly changed as evidenced by the hearings which have been conducted by Congressman Rodino and are currently being conducted by other congressmen. It should be noted by this court that the sociology of this problem is that now these illegal aliens because of various factors, enter this country to seek employment and are literally working in every area of the country and particularly in the industrial northeast. The proposed Rodino bill and hearings clearly indicates that the problem of illegal aliens is as a result of the fact that they can be employed without any adverse effect on the employer and that their sole motivation in coming to the United States is to earn money which is not attainable in their own countries.

With this background in mind, the defendant, Ernesto Lopez, was arrested and charged with harboring aliens. This is the first time that anyone has even been arrested for merely giving shelter and lodging to these people. In the trial record, it is abundantly clear that he had absolutely nothing to do with bringing these people into the country, that they were here and had completed the course of conduct of smuggling and were outside its scope. Many of them had been here for a substantial amount of time before they sought to rent living space from Mr. Lopez, and many came here legally and when they first rented from the defendant, they were in this country legally.

It is fundamental to the contention of the appellant that, in fact, the trial record was that each of these aliens were in the country, that each of them had completed the process which is described herein as smuggling and that in any fair reading of the statute, the court must rule that

Mr. Lopez was not, in fact, harboring these individuals.

The legislative and judicial history of this statute as recited, clearly indicates that the statute concerns itself with smuggling and the various aspects of smuggling and that harboring must be construed as part of that process. Here the trial court denied the appellant's motion to dismiss based on this argument and it is the appellant's contention that the court was in error.

By any fair construction of this statute and the normal application of the rule of ejusdem generis and any fair interpretation of the use of words "or" and "and" in the statute together with the title of the statute, it is evident that the statute, on its face, concerns itself entirely with the smuggling process and harboring and concealing as part of that process.

The very title of the statute, "BRINGING IN AND HARBORING CERTAIN ALIENS; PERSONS LIABLE; AUTHORITY TO ARREST" (emphasis added), and the first phrase, "any person including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who . . ." by any fair reading as applied to subsection three clearly indicates that the statute is concerned with smuggling and its various aspects and that the court can not supply a strained interpretation that can not fairly be read in the statute. Mr. Justice HOLMES in *McBoyle* v. *U.S.*, 283 US 25 (1931) said, "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies or upon the speculation that if the legislators had thought of it, very likely broader words would have been used".

This position is further supported by the history as recited above, the Congressional debates and it is even supported in the case of *Herrera* v. *U.S.*, C.A. Cal. 1953, 208 F2d 215, certiorari denied, 74 S.Ct. 529, 347 U.S. 927, 98

L. Ed., 1080 which the government so heavily relies on where that court indicated that the entire statute should be read as one thought or sentence. It is, therefore, the appellant's contention that the District Court erred in not dismissing the entire indictment as the trial record fails to show that the appellant was, in any way, involved in the smuggling process and therefore, could not be construed to have harbored the various aliens he was charged with harboring.

Adding further weight to this position is the fact that despite the long history of this statute, no prosecutor has ever prosecuted and no court has ever construed this statute to encompass the activities of this defendant.

It is further supported by the administrative policy of the Immigration Service which never instituted such a prosecution, and apparently never construed this statute to apply in this manner until this case arose.

A December 20, 1957 analysis by the General Counsel of the Immigation and Naturalization Service of the bills which became the Immigation and Naturalization Act of 1952 states with reference to Section 274 (8 U.S.C. 1324):

> "This section is designed to replace section 8 of the Immigation Act of 1917. It deals with criminal penalties against persons who bring into or land in the United States or attempt to do so, or who conceal or harbor or attempt to do so, aliens who are not duly admitted by immigation officers or who are not lawfully entitled to enter or reside in this country. The penalty of maximum imprisonment of five years and fine of $2000 for each violation is proposed."
>
> (The foregoing analysis is on file in the Supreme Court Library.)

Throughout the foregoing legislative history and amendments, no attempt was made to define the limits of the word "harbor."

For the Immigration Service, the U.S. Attorney and the court to now abandon its previous administrative, prosecutorial and judicial construction and application of this section is gross error.

In view of the foregoing, judgment should be reversed, and the information dismissed.

POINT II

The District Court erred in denying the defendant's motion to dismiss the indictment due to failure of the United States to prove that the defendant had *harbored* any aliens.

The appellant contends that the court should have dismissed the entire indictment and/or the superseding information on the grounds that the court committed error with respect to its interpretation and definition of the word harboring. The proof in the case clearly showed that the defendant gave lodging to certain aliens and this appeal is based on the giving of lodging to individuals, Isabel Martinez-Ramono and Saul Antonio Flores-Reyes, and upon the entire record of the trial held in the Eastern District Court.

It is a fundamental principle of criminal jurisprudence that where a term is susceptible to two or more definitions, that the defendant must be given the benefit of the doubt as to the definition of the term. Here the definition of the word harboring was defined by the court as meaning to give lodging or shelter to the aliens in questions. The court at page 734 of the trial record indicated that it would follow the definition given in the case of *Herrera* v. *U.S.*, (*supra*) as applying to the statute and denied this writer's motion to dismiss based on that authority. In the *Herrara* case the issue of the definition of harboring was never before that court in its decision, but the court, rather gratuitously spoke of the term harboring and in a footnote, added

the Webster's Dictionary definition of the term to the case. Thus, the use of the *Herrara* case as authority was questionable at best by this trial court. The term harboring has been defined consistently in a number of criminal prosecutions, especially with reference to aliens and the definition has consistently been, in substance, ". . . to clandestinely shelter, succor and protect improperly admitted aliens . . .", *U.S.* v. *Mack,* (*supra*) and *Susnjar* v. *U.S.,* (*supra*). It is also defined in *Black's Law Dictionary, Revised Fourth Edition* as follows:

> "HARBOR, v. To afford lodging to, to shelter, or to give a refuge to. Hancock vs. Finch, 126 Conn. 121, 9 A.2d 811. To clandestinely shelter, succor, and protect improperly admitted aliens. Susnjar vs. U.S., C.C.A. Ohio, 27 F.2d 223, 224. To receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of same. *Jones* v. *Van Zandt,* 5 How. 215, 227, 12 L.Ed. 122. Or, in a less technical sense, it is the reception of persons improperly. Poll. Torts 275; Wood vs. Gale, 10 N.H. 247, 34 AmDec. 150; Eells vs. People, 4 Scam., Ill., 498. It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances, may be equally applicable to those acts divested of any acompanying secrecy. U.S. v. Grant, C.C.Or., 55 F. 415."

Although it is true that in the first definition of harbor is "To afford lodging to, to shelter, or to give refuge to . . .", it has never been applied, to this writer's knowledge, to a criminal prosecution. *Susnjar* v. *U.S.,* (*supra*), *Firpo* v. *U.S.,* C.C.A.N.Y. 261 F. 850, 853, *Jones* v. *Van Zandt,* 5 How. 215, 227, 12 L.Ed. 122, *U.S.* v. *Mack,* (*supra*), and by implication, *U.S.* v. *Evans,* (*supra*).

Each of these courts said the following about the word harboring. In *Susnjar* v. *U.S.*, (*supra*), the court said, ". . . When taken in connection with the purposes of the act, we conceive the natural meaning of the word 'harbor' to be to clandestinely shelter, succor, and protect improperly admitted aliens, and that the word 'conceal' should be taken in the simple sense of shielding from observation and preventing discovery of such alien persons . . ."

In *Firpo* v. *U.S.*, (*supra*), the court indicated that the word harbor means to lodge, to care for, after secreting the deserter.

In *U.S.* v. *Mack*, (*supra*), the court said, ". . . Indeed, the word harbor alone often connotes surreptitious concealment . . ."

In *U.S.* v. *Evans*, (*supra*), although the court was not directly faced with the requirement of defining the statute and more specifically, the word harboring, it said, ". . . In the first place, the section as originally enacted was limited to the acts of smuggling. And there is some evidence in the legislative history that the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process." The court, in a footnote following this passage, cites the Senate Report accompanying the 1917 Amendment which stated that ". . . such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the U.S. and related offenses . . ." The natural implication of this case is that the court in construing the predecessor statute, which statute is virtually unchanged, except for its penalty provisions, necessary implied that the harboring was a part of the smuggling process which, by its nature, is clandestine.

The case before this court is one which requires that the word harboring be construed by this court. The appel-

lant's position is that it must be construed most favorably to the defendant, to wit: where there are more than one possible construction of the word which rationally and reasonably fits the applicable section, the defendant must be given the benefit of the doubt as to the interpretation to be given, unless the Congress has clearly expressed itself to the contrary.

The proof in this case demonstrates that the defendant was a landlord and the indictment charged him with harboring the aliens at certain addresses. The particular count which is herein appealed merely indicates that the two aliens in question, Isabel Martinez-Ramono and Saul Antonio Flores-Reyes, resided at houses owned by the defendant and paid him rent. There is not a scintilla of evidence that the defendant, in any way, had secreted or made any attempt to prevent lawful authorities from discevring their whereabouts.

The appellant, therefore, takes the position that the court must construe harboring to mean a clandestine sheltering or concealing as indicated in *Black's Law Dictionary* and in the aforecited cases and that further, the defendant in this case could not fairly be apprised that merely giving lodging or shelter was sufficient to constitute a crime under Section 1324 in light of the definition of the term and cases which construed this section and its predecessor sections (which sections have not changed in substance since their enactment in 1917).

It is the appellant's position that the court has no alternative but to strictly construe the word harboring in favor of the defendant. This proposition is clearly set forth in innumerable cases, to wit: *Rewis* v. *U.S.*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 2d 492, where the Supreme Court said, ". . . and even if this lack of support were less apparent, the ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Also see *Bell* v. *U.S.*, 349 U.S. 81, 83, 99 L.Ed. 905, 910, 75 S.Ct.

620 (1955) and *U.S.* v. *Enmons,* 410 U.S. 396, 93 S.Ct. 1007, and *Kritchman* v. *U.S.,* 256 U.S. 363, 41 S.Ct. 514, 65 L.Ed. 992 where the court said, in substance, that while criminal statutes are to be given a reasonable construction, ambiguities are not to be resolved to embrace offenses not clearly within the law.

Therefore, the District Court erred in denying the defendant's motion to dismiss for failure to prove that the defendant had harbored any of the aliens in question and in construing the word harboring to mean merely giving shelter or lodging.

Therefore, the information and indictment upon which this appeal is based should be dismissed.

POINT III

The District Court erred in not dismissing the indictment as being unconstitutionally vague *per se* and as applied to this individual and that the statute did not give the defendant fair notice that his actions were in violation of law.

Based on the history of this statute, as recited in Point I, and based on the trial record in this case, and based on the fact that no court has ever construed the statute as it has been construed in this case and based on the fact that both in the trial record and on the research done by both prosecution and defense in this case, it is apparent that there has never been a prosecution or construction of the statute as it has been construed and prosecuted in this case. And based on the testimony of the immigration agents that they had never arrested anyone, nor ever heard of anyone being arrested for merely renting to illegal aliens, and based on the fact that immigation agents had, on at least one prior occasion, been to the defendant's residences and had arrested illegal aliens there and that they never advised the defendant that it was in any way illegal or improper for

him to rent living space to such individuals; this statute is unconstitutionally vague in fact and as here applied.

It being a fundamendal principle of criminal jurisprudence that an individual is entitled to fair warning and notice of the fact that his activities or actions are illegal, it is the contention of the appellant that due to the vagueness of the statute, the failure to advise the defendant that his activities were illegal and the previous construction of the statute and the history of said statute, the defendant-appellant was and could not be fairly apprised that any of the activities in which he participated, to wit: the renting of living space to illegal aliens, was prohibited by law.

The defendant has, therefore, been deprived of any notice that such activities were criminal in nature and although this court may deny each and every point in this brief, it is the appellant's contention that the court must dismiss this case as against the defendant because of the failure of both the statute in its vagueness and its prior judicial and legislative history to put the defendant on notice that his actions were in violation of law.

It is, therefore, the appellant's contention that due to its fundamental vagueness and the application of the statute as applied in this case, the defendant was deprived of due process of law and that in light of the prior history of the statute, its application creates an ex post facto law. In *Bouie* v. *Columbia,* 378 U.S. 347, 84 Sup. Ct. 1697, 12 L.Ed. 2d 894, the court said:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. . . .
>
> Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally* v. *General Constr. Co.,* 269

> U.S. 385, 391. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law,' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453.

It is true that in the *Connally* and *Lanzetta* cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the Court concluded that the statute was "void for vagueness." The instant case seems distinguishable since on its face the language of § 16-386 of the South Carolina Code was admirably narrow and precise; the statute applied only to "entry upon the lands of another . . . after notice . . . prohibiting such entry. . . ." The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical "void for vagueness" situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of the penal statutes," as in *Lanzetta*, or to "guess at [the stat-

ute's] meaning and differ as to its application," as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before before committing the conduct in question.

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce* v. *United States,* 314 U.S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given case by a construction in that very case placing valid limits on the statute," for "the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss . . ." Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951); see Amsterdam, Note, 109 U. of Pa. L. Rev. 67, 73-74, n. 34.

If this view is valid in the case of a judicial construction which adds a "clarifying gloss" to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable, judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action

done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or that "aggravates a crime, or makes it greater than it was, when committed." *Calder* v. *Bull,* 3 Dall 386, 390. If a State Legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith* v. *Cahoon,* 283 U.S. 553, 565. . . ."

As in the *Bouie* case, the construction placed on 1324 has been broadened by the trial court to encompass activities previously not condemned either by the government or the courts. The trial court judicially enlarged the scope of the statute in applying it to activities beyond smuggling and and transporting, and it broadened it in defining harboring in a way it had not previously been defined.

Wherefore the information should be dismissed.

POINT IV

The District Court erred in not declaring that the statute as applied to the appellant violated his constitutional rights with respect to equal protection of law, and due process of law.

That if, in arguendo, this court sustains the trial court's position with respect to the appellant's contention in Point I concerning the fact that the statute is to be applied only to smuggling and the various aspects of it and if this court further sustains the government's position and the trial court's position with respet to the definition of the term harboring, then a situation is created wherein the defendant-appellant is denied the equal protection of law under the basic concepts of fairness and equal protection as judicially applied. *Bowling* v. *Sharpe,* 74 S.Ct. 693, 347 U.S. 497;

Shapiro v. *Thompson*, 89 S. Ct. 1322, 394 U.S. 618; *U.S.* v. *Pipefitters' Local Union #562*, 434 F.2d 1127, cert. granted 91 S. Ct. 2168, 402 U.S. 994.

The trial record obviously indicates that the defendant had nothing to do with smuggling or its processes. As the record indicates, therefore, the defendant is an individual who rents on a week-to-week tenancy to illegal aliens. The statute in its exception provision excepts employers from liability under the act. The concepts of due process and equal protection of law require, therefore, that there must be a rational distinction between the classes created under such exceptions.

Here, assuming arguendo, that the court denies every other aspect of this appeal, then in that event, this argument takes on its greatest significance. There is, in fact, no basis to form a rational distinction for excepting employers from liability and not excepting a landlord from liability. Nothing could be evidenced better than the colloquy between this writer and the trial judge with respect to this motion to dismiss on this ground, to wit: a lack of rational distinction which rendered it patently unconstitutional. The court stated as follows at page 750 of the trial record:

> "The Court: Well, if the statute had carved out other exceptions besides employers, you might have a point on the smuggling question. But I cannot say that Congress had no rational basis for excluding employers from this statute and under the circumstances, I think —my own feeling at the moment is that I would not hold the statute unconstitutional on that ground.
>
> I can see a rational basis for drawing a distinction between employers and other persons.
>
> Mr. Reilly: Would the Court state that basis?
>
> The Court: Well, for one thing, employers would not have the same facility to determine whether a person was an illegal alien as an owner would. I

think that the—particularly volume employers, when you are talking about enormous volumes of employers, several thousand, what-have-you, it—I think perhaps this was Congress' reason for carving out an exception in the case of employers and putting the burden on other persons, such as landlords and so forth that they have placed by this statute.

Mr. Reilly: Well, with respect to that, I think in fact in the common and ordinary dealings of life that we all have, in a landlord-tenant relationship, this is not necessarily the case at all, especially if it's any week-to-week tenancy which is basically what we are talking about here.

I don't think there is any obligation on a landlord to take any detailed information or to delve into the background or especially nationality of an individual and in fact, I think there are statutes that preclude one from being involved in questioning of this nature in renting or selling homes to people.

I think quite the opposite is true, when one goes for virtually any job, as evidenced by the things like job applications, the employer in fact gets a lot more information than is incumbent upon a landlord to get.

So I don't feel that that is a rational basis for this at all.

The Court: Well, it's apparently—apparent rational behind the exception."

It is self evident from this colloquy that not even the court could come up with a sensible explanation for this distinction.

The court is referred to the pending Rodino bill and hearings and the court should consider the fact that that committee and the proposed legislation is aimed at eliminating this exception which is the very thing that causes these people to come to this country. The absurdity of the trial court's position in failing to dismiss the indictment

based on this motion can be pointed out with a few homely examples.

Supposing Mr. Lopez were to give each of these individuals a small job while they were living in his homes, for example, mowing the lawn, sweeping the house, et cetera, and paid each of them $1.00 per week for doing that service. Clearly, this being a criminal statute, he would be totally exempt from prosecution as he is their employer and since a criminal statute must be strictly construed.

Or an equally absurd situation where if the defendant, Mr. Lopez, had been employed by any of these factories to solicit illegal aliens to work for them and as part of his agreement, he would provide housing. The government would have no case based on the exception.

In fact, it is the appellant's further contention that providing housing fits within and should be included in the usual and normal practices incidental to employment, and the court must construe the statute most favorably to the defendant. It is apparent, therefore, that there is no rational distinction which can be drawn and the trial court erred in not dismising the indictment on this basis and this court must, therefore, if it construes the other points of this brief in favor of the government's position, find this section of the statute to be unconstitutional as it creates a preferred class without rational distinction.

The irrationality of the preferred class in the present law is emphasized and made abundantly apparent by Appendix "A", the proposed Rodino bill. The overall purpose of the statute is to keep illegal aliens out of the country and to get them out of the country after they have entered. As the Rodino bill and the committee hearings indicate on virtually every page, the entire purpose of the present law is destroyed by the very fact of the exception; for if the employers were subject to liability under the act, they would not hire and the aliens would have no reason to enter

this country. Thus, to exempt the root cause of the problem from prosecution while holding in others as liable under the statute who perform services which are ancillary to the employment, is patently irrational and this subsection concerning harboring must be declared unconstitutional and the information and indictment must be dismissed.

Therefore, the court must declare the statute, especially as applied to the facts of this case, to be unconstitutional and must dismiss the information.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed, the statute declared unconstitutional and the indictment and information dismissed for the prosecution's failure to prove a *prima facie* case and to prove the defendant's guilt beyond a reasonable doubt.

Respectfully submitted,

PETER M. J. REILLY, JR.
Attorney for Defendant-Appellant

February 26, 1975

Statute Involved.

Title 8, United States Code, Section 1324 of the Immigration and Nationality Act of 1952.

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the

purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

(b) No officer or personal shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, whose duty it is to enforce criminal laws.

June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228.

Service of three (3) copies of
the within
is hereby admitted this day
of , 197

Attorney for